

BEFORE THE PERSONNEL APPEALS BOARD

STATE OF WASHINGTON

SHARYN NIEMI,)	Case No. RED-02-0017
)	
Appellant,)	FINDINGS OF FACT, CONCLUSIONS OF
)	LAW AND ORDER OF THE BOARD
v.)	
)	
DEPARTMENT OF LABOR AND INDUSTRIES,)	
)	
Respondent.)	

I. INTRODUCTION

1.1 Hearing. This appeal came on for hearing before the Personnel Appeals Board, WALTER T. HUBBARD, Chair, and GERALD L. MORGEN, Vice Chair. The hearing was held at the office of the Personnel Appeals Board in Olympia, Washington, on January 8, 2003. RENÉ EWING, Member, did not participate in the hearing or in the decision in this matter.

1.2 Appearances. Appellant Sharyn Niemi was present and was represented by Christopher J. Coker, Attorney at Law, of Parr & Younglove, P.L.L.C. MB Newberry, Assistant Attorney General, represented Respondent Department of Labor and Industries.

1.3 Nature of Appeal. This is an appeal from a disciplinary sanction of a three-month, ten percent reduction in pay for neglect of duty, inefficiency and willful violation of published employing or Department of Personnel rules or regulations. Respondent alleges that Appellant engaged in excessive personal and inappropriate use of the agency's e-mail system.

1.4 **Citations Discussed.** WAC 358-30-170; Baker v. Dep't of Corrections, PAB No. D82-084 (1983); McCurdy v. Dep't of Social & Health Services, PAB No. D86-119 (1987); Anane v. Human Rights Commission, PAB No. D94-022 (1995), *appeal dismissed*, 95-2-04019-2 (Thurston Co. Super. Ct. Jan. 10, 1997); Skaalheim v. Dep't of Social & Health Services, PAB No. D93-053 (1994).

II. FINDINGS OF FACT

2.1 Appellant Sharyn Niemi is a Medical Treatment Adjudicator and permanent employee for Respondent Department of Labor and Industries. Appellant and Respondent are subject to Chapters 41.06 and 41.64 RCW and the rules promulgated thereunder, Titles 356 and 358 WAC. Appellant filed a timely appeal with the Personnel Appeals Board on April 19, 2002.

2.2 Appellant began her employment with the state of Washington in 1989. In May 1993, Appellant accepted a transfer to a position as a Medical Treatment Adjudicator (MTA) 1 within the L&I Health Services Analysis program. Appellant's primary duty as an MTA is to adjudicate bills of injured employees in retraining programs. Appellant spends approximately 80 percent of her time performing work on the computer.

2.3 On September 30, 2001, Mr. Connell authorized access to Appellant's agency e-mail account for a review of her use of the agency's e-mail system from September 6, 2000 to September 27, 2001.

2.4 Appellant's e-mail activity reflected that she sent a total of 273 personal e-mails. The content of the e-mails varied, but included e-mail that contained sexual content and intimate discussions with a coworker, Eliezar Montalvo, with whom she was engaged in a personal relationship. Appellant initiated approximately 179 e-mails to Mr. Montalvo from March 2, 2001 to April 2, 2001.

1 2.5 Appellant sent approximately 94 additional e-mails to a variety of other recipients, including
2 numerous coworkers at L&I. The nature of these e-mails ranged from innocuous jokes, jokes which
3 contained sexual innuendo; attachments of crude and inappropriate pictures; a series of e-mails in which
4 she discussed her personal relationship with Mr. Montalvo with another coworker; and e-mails to her
5 personal attorney regarding an outside personal business she was interested in establishing.

6
7 2.6 Appellant does not dispute that she engaged in use of the agency's e-mail system for non-
8 business purposes.

9
10 2.7 Respondent has adopted Policy 3.00, Ethical Standards for State Employees, which requires
11 employees to "adhere to high ethical standards" and prohibits employees from using state resources for
12 personal benefit.

13
14 2.8 Respondent has adopted Policy 3.30, Private Use of State Resources, which defines an
15 employee's responsibility in the use of state resources. The policy provides that misuse of work time or
16 other state resources "is an abuse of public trust and is subject to corrective or disciplinary action as
17 appropriate."

18
19 2.9 Respondent has adopted Policy 7.30, which outlines the department's position on the proper
20 business and personal use of computer technology, electronic e-mail, and the internet by employees or
21 any other persons using state technology resources. The policy permits use of its technology resources
22 for "business or limited personal use appropriate for the workplace" (emphasis added). The policy
23 further states that limited personal use of technology resources by L&I employees is permissible if all
24 the following are met:

25
26 A. The use is approved by a supervisor or manager to promote organization
effectiveness or enhance job related skills.

- 1 B. These resources are not being used just to avoid personal expense.
2 C. There is no cost to the state, or the cost is deemed “*de minimis*” (so small as to
3 being insignificant or negligible).
4 D. The use of these resources does not interfere with the performance of the
5 employee’s official duties.
6 E. The use is brief in duration, infrequent, and does not disrupt or distract from the
7 conduct of state business due to volume or frequency.
8 F. The use does not compromise the security or integrity of state information,
9 computer systems, or networks.

10 2.10 L&I’s Policy 7.30 was adopted in accordance with WAC 292-110-010 - Use of State Resources,
11 which provides:

- 12 (1) No state officer or state employee may use state resources including any person,
13 money, or property under the officer’s or employee’s official control or direction or in his
14 or her custody for private benefit or gain of the officer or employee or any other person . .
15 .

16 2.11 L&I posts all its policies on its homepage. In addition, the department sends periodic e-mails to
17 all employees regarding the use of computer technology, including e-mail, for personal purposes. In
18 addition to posting notices on the L&I Intranet, which is accessible to all employees upon logging onto
19 their computers, the department also sent direct e-mails to each employee’s e-mail address with
20 reminders and information regarding appropriate and prohibited uses of the agency’s e-mail system.
21 Specifically, on April 20, 2000, an L&I Intranet notice was posted which read: Special attention to be
22 given to the new agency policy (7.30) regarding the proper and legal use of technology here at L&I,
23 including e-mail and the Internet. ... All employees are urged to read and understand these new
24 policies, and to ask questions where further clarification is needed.”

25 2.12 Appellant admits that she previously read Policy 3.30. However, she denies having seen or read
26 policies 3.00 and 7.30, and she asserts that she was unaware of the agency’s policy regarding non-
business use of the e-mail system. She also contends that she was unaware that the nature of her e-mails
was inappropriate. However, we are not persuaded by Appellant’s contention that she was unaware of

1 the policies regarding the appropriate use of state computers. Respondent presented evidence that L&I's
2 home page clearly identifies for employees where all agency policies can be found. Furthermore, we
3 are not persuaded that Appellant, a 14-year employee, was unaware of the agency's policy regarding use
4 of the agency's computer technology or that she was unaware that the content of her e-mails was
5 inappropriate or that the volume was excessive.

6
7 2.13 After reviewing the e-mails sent by Appellant, we find that Appellant's personal use of the L&I
8 e-mail system was not limited in nature and that the majority of the e-mails were not appropriate for the
9 workplace. The volume of the e-mails sent by Appellant was excessive and exceeded any acceptable
10 limit of a state resource by a state employee. Furthermore, Appellant's use of the agency's e-mail
11 system was not approved by her supervisor and took time away that Appellant could have been
12 performing her official duties.

13
14 2.14 Douglas Connell was the Assistant Director for Insurance Services and was Appellant's
15 appointing authority when Appellant's reduction in pay was imposed. In determining whether
16 Appellant engaged in misconduct, Mr. Connell reviewed the e-mail messages sent by Appellant. In
17 addition, Mr. Connell met with Appellant on January 29, 2002 to give her the opportunity to respond to
18 the charges. During the meeting, Appellant asserted that she did not believe the content of the e-mails
19 was sexual in nature, she asserted that she was ignorant as to the proper use of e-mail and she stated that
20 she was unfamiliar with the department's policies regarding use of e-mail. During the meeting,
21 Appellant also submitted a letter dated January 29 in which she provided Mr. Connell with an
22 explanation of her e-mail use and asked him for leniency when he took disciplinary action against her.
23 Mr. Connell, however, did not find Appellant's assertions credible, and he did not believe that Appellant
24 was unaware that her e-mail use was inappropriate for the workplace.

1 2.15 Mr. Connell believed that some personal use of the agency's e-mail system by employees was
2 acceptable. He felt, however, that such personal use was limited to brief messages to other coworkers,
3 such as "good morning" or brief messages to a family member if an employee was going to arrive home
4 late. Mr. Connell concluded that Appellant misused the agency's e-mail system by sending excessive
5 and inappropriate e-mails to other coworkers. Mr. Connell also found that Appellant's e-mails far
6 exceeded any acceptable personal use and contained inappropriate content for the workplace. Mr.
7 Connell concluded that Appellant's e-mails exceeded de minimis use, violated agency policies, and
8 distracted her from her work.

9
10 2.16 In determining the appropriate level of discipline, Mr. Connell reviewed Appellant's
11 employment record. Mr. Connell noted that Appellant had a history of good work performance and had
12 no prior history of disciplinary or corrective action. However, he noted that a prior performance
13 evaluation made reference to Appellant's inappropriate use of state resources when she used the agency
14 phone to conduct personal conversations. Mr. Connell felt that a harsh sanction was necessary to deter
15 Appellant from engaging in further misconduct. Mr. Connell decided that a three month reduction in
16 pay was appropriate and fair, based on her 14-year history with the department and her positive
17 performance record.

18
19 2.17 By letter dated April 4, 2002, Mr. Connell notified Appellant of her ten percent reduction in pay,
20 from a range 35, step K to range 35 step G, effective May 1, 2002 through the end of her work shift on
21 July 31, 2002. Mr. Connell charged Appellant with neglect of duty, inefficiency, and willful violation
22 of published employing agency or Department of Personnel rules or regulations. Mr. Connell
23 specifically alleged that Appellant engaged in excessive, unauthorized personal use of the agency's e-
24 mail system, including e-mail that contained sexual content.

III. ARGUMENTS OF THE PARTIES

3.1 Respondent argues that Appellant neglected her duty when she used the agency's e-mail system for lengthy and personal communications of an inappropriate nature. Respondent argues that Appellant had a duty to work during business hours and that she was inefficient because she was focused on writing personal e-mails rather than performing her duties. Respondent argues that Appellant knew that she was not supposed to use state resources for personal benefit and argues that Appellant is not credible when she states that she did not understand that her use of the e-mail system was inappropriate. Respondent argues that Appellant willfully violated agency policy and that the disciplinary sanction imposed is appropriate to impress on Appellant that she cannot continue to engage in improper use of state resources.

3.2 Appellant asserts that she was unaware of the agency's policy regarding use of the e-mail system. Appellant argues that there is a lack of clear evidence that the agency's policies were made available to her, that she ever received them or that she was provided agency training on the policies. Appellant also contends that she did not believe that the content of her e-mails was sexual in nature until it was pointed out to her. Appellant further asserts that many of her e-mails were brief in nature consisting of only one or two lines. Appellant asserts that her e-mail use was limited in nature and that her performance was not impacted. Appellant asserts that the level of discipline imposed was too harsh, that a letter of reprimand would have been more appropriate and would have allowed her to correct her behavior.

IV. CONCLUSIONS OF LAW

4.1 The Personnel Appeals Board has jurisdiction over the parties hereto and the subject matter herein.

1 4.2 In a hearing on appeal from a disciplinary action, Respondent has the burden of supporting the
2 charges upon which the action was initiated by proving by a preponderance of the credible evidence that
3 Appellant committed the offenses set forth in the disciplinary letter and that the sanction was
4 appropriate under the facts and circumstances. WAC 358-30-170; Baker v. Dep't of Corrections, PAB
5 No. D82-084 (1983).

6
7 4.3 Neglect of duty is established when it is shown that an employee has a duty to his or her
8 employer and that he or she failed to act in a manner consistent with that duty. McCurdy v. Dep't of
9 Social & Health Services, PAB No. D86-119 (1987).

10
11 4.4 Inefficiency is the utilization of time and resources in an unproductive manner, the ineffective
12 use of time and resources, the wasteful use of time, energy, or materials, or the lack of effective
13 operations as measured by a comparison of production with use of resources, using some objective
14 criteria. Anane v. Human Rights Commission, PAB No. D94-022 (1995), *appeal dismissed*, 95-2-
15 04019-2 (Thurston Co. Super. Ct. Jan. 10, 1997).

16
17 4.5 Willful violation of published employing agency or institution or Personnel Resources Board
18 rules or regulations is established by facts showing the existence and publication of the rules or
19 regulations, Appellant's knowledge of the rules or regulations, and failure to comply with the rules or
20 regulations. Skaalheim v. Dep't of Social & Health Services, PAB No. D93-053 (1994).

21
22 4.6 Respondent has met its burden of proof that Appellant neglected her duty and willfully violated
23 L&I Policies 3.00, 3.30, 7.30 when she utilized the department's computers and e-mail system for non-
24 work related purposes. Appellant should have known of her duty and responsibility to use the
25 department's computers and its e-mail system for work related purposes only, and she neglected that
26 duty as reflected by her extensive personal use of the e-mail system. Respondent has met its burden of

1 proof that Appellant was inefficient when she used her state owned computers and the e-mail system to
2 initiate and respond to lengthy, non-work related e-mails during work time rather than performing the
3 duties of her position. Appellant's repeated use of the agency's e-mail system to send personal e-mails
4 during work hours is not acceptable and should not be condoned by the department.

5
6 4.7 In determining whether a sanction imposed is appropriate, consideration must be given to the
7 facts and circumstances, including the seriousness and circumstances of the offenses. The penalty
8 should not be disturbed unless it is too severe. The sanction imposed should be sufficient to prevent
9 recurrence, to deter others from similar misconduct, and to maintain the integrity of the program.
10 Holladay v. Dep't of Veterans Affairs, PAB No. D91-084 (1992).

11
12 4.8 In assessing the level of discipline imposed here, we conclude that the reduction in salary
13 imposed is not too severe and is appropriate under the circumstances. Therefore, the appeal of Sharyn
14 Niemi should be denied.

15
16 **V. ORDER**

17 NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of Sharyn Niemi is denied.

18
19 DATED this _____ day of _____, 2003.

20
21 WASHINGTON STATE PERSONNEL APPEALS BOARD

22
23 _____
24 Walter T. Hubbard, Chair

25 _____
26 Gerald L. Morgen, Vice Chair

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26